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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

IN THE MATTER OF:	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket 92-259
	)	
Section 76.62(a) Rule on Carriage of a Broadcast Station's Entire Program Schedule	)	

SUPPLEMENTAL COMMENTS OF COX CABLE COMMUNICATIONS, A DIVISION OF COX COMMUNICATIONS, INC.

Cox Cable Communications, a division of Cox Communications, Inc. ("Cox"), by its attorneys, hereby submits these supplemental comments in connection with the Commission's reconsideration of Section 76.62(a) of its new broadcast signal cable carriage rules.[1/]

Cox applauds the Commission's recent decision to stay the effectiveness of Section 76.62(a) of the Commission's rules, which requires cable operators to carry the entire program schedule of all broadcast stations the system carries -- not merely those carried pursuant to must-carry obligations. Cox files these supplemental comments to

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1/ These supplemental comments are being filed in direct response to the Stay Order the Commission adopted and released on October 5, 1993 (FCC 93-467) on this matter. The Stay Order re-opened the issue of the propriety of Section 76.62(a) of the Commission's rules. Cox believes that these late-filed comments will be useful to the Commission in resolving this issue, and respectfully requests that the Commission accept and consider these comments.

bring to the attention of the Commission a specific example of part-time carriage that helps demonstrate the substantial benefits part-time carriage can deliver to broadcasters, copyright owners, cable operators and television viewers.

DISCUSSION

A subsidiary of Cox operates a 32,000 subscriber cable system in Saginaw, Michigan. The Detroit television stations, if carried, would be distant signals on the system for copyright purposes, and the system generally has not carried Detroit signals.

The one exception has been Television Station WKBD, Channel 50, licensed to Detroit, which has some programming of great interest to the system's subscribers. The programming that has excited greatest interest has been the Detroit Red Wings hockey games, and the system has also found subscriber interest in news and public affairs programming on the station, as well as other sports programming and coverage of special events of interest in Michigan. The station is a Fox affiliate, and subscribers have shown no interest in receiving the Fox programming that merely duplicates Fox programming already available locally in the system's television market. Carriage of the entire WKBD signal under the cable copyright compulsory license would cost the system approximately $100,000 a year -- an amount almost twice as high as the system's entire projected

1994 copyright payment for its carriage of distant superstations.[2/] And all for a limited list of programs of interest.

The Saginaw system and WKBD entered negotiations last year[3/] and ultimately reached a private copyright license and carriage agreement that has benefited the station, the copyright owners of the affected programming, and the system's subscribers. Under the agreement, finally concluded in December 1992, the Saginaw system pays WKBD an amount per subscriber per month in exchange for a license to carry certain specified programming on the station. The station is either the copyright owner of the specified programming or has negotiated with the copyright owners and obtained the right to grant the system this license. This kind of part-time private rights clearance agreement has been expressly approved by the U.S. Copyright Office as a

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2/ Because the system is also carrying two popular superstations as distant independent signals, carriage of WKBD (or one of the superstations) would be assessed at the high 3.75% royalty rate.

3/ When negotiations were conducted, WKBD was owned by a company affiliated with Cox Communications, Inc. However, Cox was already at the same time publicly announcing its intention to sell the station, and the negotiations between WKBD and the Saginaw system were conducted between the station manager and the system manager at arm's length. The station has since been sold to Paramount, which assumed the agreement with the Saginaw system at the time of sale.

valid alternative to the Section 111 copyright compulsory license.[4/]

The agreement covers the Detroit Red Wings hockey games and other local sports programming. It also covers the station's news programming and public affairs programming, including Ask the Governor, Places For Kids, Straight Talk, For My People, and Washington Report. Finally, the agreement includes coverage of a number of special events of local interest to Michiganders.

Without this agreement and the part-time cable carriage it authorizes, everyone loses. The system will either have to drop this programming of interest to its subscribers, or carry the station in its entirety under the compulsory license and pass through huge increased programming costs to subscribers.[5/]

With the agreement and the part-time carriage, everyone wins. The station and the owners of the relevant programming exercise control over the programming they own

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4/ See Letter from Dorothy Schrader, General Counsel of the U.S. Copyright Office, to Steven Horvitz (March 14, 1989) attached as Exhibit A to these Supplemental Comments.

5/ Ironically, under the current and long-standing cable royalty distribution scheme, these new, sizable royalty payments would not, in any case, go primarily to the owners of the programming desired by Saginaw subscribers. Broadcasters receive only a negligible percentage of these royalties. Most of the money is distributed to Hollywood syndicators, who play no role in any of the programming that Saginaw's subscribers are anxious to obtain from WKBD.

and receive compensation for its use. The system obtains programming at a negotiated fair market price. And the subscribers get access to important, unique and worthwhile programming in which they have great interest, without undue additional expense.

WKBD has granted retransmission consent to the Saginaw system, but Section 76.62(a), as currently written, threatens this highly successful carriage arrangement. While Cox appreciates that stations carried pursuant to the must carry provisions should be carried in their entirety, the retransmission consent rules must be flexible enough to permit the kind of arrangement that the station and the system have worked out so well in Saginaw. Indeed, in this case, there is not any competing interest worth vindicating, or that supports application of Section 76.62(a)'s requirement that even retransmission consent stations be carried in their entirety.[6/]

6/ Cox believes the Commission should limit application of 76.62(a) to must carry signals, and not to retransmission consent signals. At bare minimum, however, the Commission should permit on a grandfathered basis those part-time carriage deals for retransmission consent signals that pre-date the adoption of the rules in March, 1993.

CONCLUSION

The Commission acted wisely in staying the effectiveness of Section 76.62(a). However, unless it changes the rule, worthwhile and successful carriage arrangements like the Saginaw system's part-time carriage of WKBD will be forced to end. Cox respectfully urges the Commission to change Section 76.62(a) so as to permit the continued part-time carriage of WKBD on the Saginaw system.

Respectfully submitted,

COX CABLE COMMUNICATIONS, a
Division of COX
COMMUNICATIONS, INC.

By 
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October 22, 1993

AFFIDAVIT

State of Michigan)
) ss.
County of Saginaw)

I, Philip C. Ahlschlager, do hereby state that I am Vice President and General Manager of Cox Cable Saginaw, Inc. I have read the foregoing Supplemental Comments of Cox Cable Communications, A Division of Cox Communications, Inc. and the facts contained therein are true, complete and correct.

Philip C. Ahlschlager

Sworn to and subscribed
before me this 21st day
of October, 1993.

Jennifer Lee Halm

My commission expires:

JENNIFER LEE HALM
NOTARY PUBLIC STATE OF MICHIGAN
SAGINAW COUNTY
MY COMMISSION EXP. MAR. 5,1997

EXHIBIT A

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OFFICE

March 14, 1989

Steven J. Horvitz, Esq.
Hogan & Hartson
555 Thirteenth St., N.W.
Washington, D.C. 20004-1109

Dear Mr. Horvitz:

This is in response to your request of December 30, 1988, for an opinion on direct licensing of broadcast programming to cable operators.

You request confirmation of the Copyright Office's letter of April 13, 1988, to David Leibowitz, in which the Office discussed its Policy Decision of November 28, 1984 (49 Fed. Reg. 46830). The Office stands by the position taken in the policy decision, and by the language you quote:

> If copyright owners and cable systems uniformly agree that negotiated retransmission consents supersede the compulsory license requirements, the Copyright Office has no reason to question this interpretation provided that the negotiated license covers retransmission rights for all copyrighted works carried by a particular broadcasting station for the entire broadcast day for each day of the entire accounting period.

The policy decision continues:

> Since it appears that the negotiated license would supersede the compulsory license under these circumstances, cable systems would not have to take account of the signal of the low power television station for which the copyright owners' consents have been obtained in paying copyright royalties. (Emphasis added.)

You also request consideration of a situation which presents a variation on the circumstances to which the above policy decision applies. You state that your client Telemundo "intends to enter into direct licensing agreements with cable operators covering specified portions of the broadcast day."

You surmise that this arrangement can be legally performed outside of the compulsory licensing system contained in 17 U.S.C. §111, if the systems black out the programming not cleared by contract. Failure to do so would subject the cable operator to the compulsory licensing provisions of section 111 for the entire accounting period during which the retransmission of uncleared programming occurred.

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Section 111 of the Copyright Act of 1976 addresses the "complex and economically important problem of 'secondary retransmissions'," according to H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 88 (1976). Congress enacted §111 to balance the interests of copyright owners whose works would be retransmitted by cable operators without their explicit permission, the cable operators who would be unduly burdened by a requirement "to negotiate with every copyright owner whose work was retransmitted by a cable system," and the public, which favored access to authors' works via new media.

In the situation you discuss, the copyright owners are directly contracting with cable operators for retransmission of their works. Every work contained in each retransmission is accounted for and compensated for within the contractual agreement between the copyright owners and the cable operators. You propose that the copyright owners thus do not need the protection §111 provides them. All interests would appear to be served.

The Office recognizes that privately negotiated license agreements can supercede the compulsory license when such agreements cover all copyrighted works retransmitted for the entire broadcast day of a given station for each day of the accounting period. The same principle may apply to retransmission of portions of the broadcast day, with the following qualifications or conditions: 1) the licenses are negotiated and obtained for all works actually retransmitted; 2) a full DSE is paid for any secondary transmissions not covered by the negotiated licenses and delivered to cable subscribers in lieu of the blacked-out portion of the first station's programming; and 3) any commercial advertising or station announcements transmitted by the primary transmitter during, or immediately before or after the transmission of the programs are not willfully altered by the cable system, except as provided by 17 U.S.C. §111(c)(3). The latter qualification may present problems for your retransmission proposal since it is not clear that the primary transmitter can waive the non-alteration provision of 111(c)(3). The problem could be solved, of course, by not substituting another broadcast signal for the blacked-out portions of the broadcast signal, as to which you engage in direct licensing.

Sincerely,

Dorothy Schrader

Dorothy Schrader
General Counsel

DS/dp

CERTIFICATE OF SERVICE

I, Michelle A. Avinger, a secretary in the law firm of Dow, Lohnes & Albertson, do hereby certify that on this 22nd day of October, 1993, I caused a copy of the foregoing "Supplemental Comments of Cox Cable Communications, a Division of Cox Communications, Inc." to be served via first class mail, postage prepaid or via hand delivery to the following:

Ms. Alexandra Wilson
Cable Services Division
Technical Services Branch
2033 M Street, N.W., Room 201
Washington, D.C. 20554

Mr. Duane G. Kell
Vice President & General Manager
WKBD(TV)
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Michelle A. Avinger